United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7577

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-7577

DONALD KATZ, Trustee in Bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc.,
Plaintiff-Appellant,

vs.

FIRST NATIONAL BANK OF GLENHEAD,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT

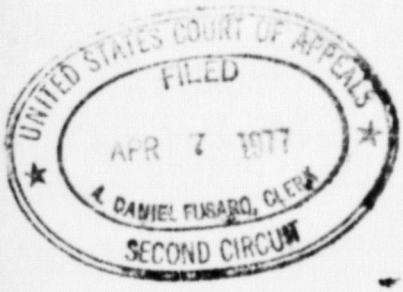

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TABLE OF CONTENTS

Table of Cases and Authorities

Cases:

Statutes:

Treatises and Annotations:

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REPLY BRIEF OF PLAINTIFF-APPELLANT

I

Where a depositor intends a bank deposit not to be made in the ordinary course of business, and bankruptcy ensues within four months, a transfer will be created by the deposit.

The distinctions which the Bank draws between the case at bar and the cases upon which plaintiff relies are irrelevant with respect to a determination of what rule of law is appli-

cable. While many of our cases do, in fact, have factual differences from this case, they nonetheless expressly articulate the correct rule which is applicable herein and which the Trial Court did not apply.

Most striking and entirely incorrect, is defendant's treatment of *Frankford Trust Co. v. Comber*, 68 F.2d 471 (3d Cir., 1933). The Court's reliance in *Frankford Trust* on this Court's decision in *Matters v. Manufacturers Trust Co.*, 54 F.2d 1010 (2d Cir., 1931), was not, as the Bank states, an erroneous reference to *Matters* as a Bankruptcy Act decision. On the contrary, the *Frankford Trust* Court, deciding its case under the Bankruptcy Act, relied upon the *reasoning* of *Matters*. And that reasoning, by Judge Learned Hand of this Court, was in *Frankford Trust* (and notwithstanding language to the contrary in *Matters*), held applicable to Bankruptcy Act cases. As the Third Circuit stated, in that Bankruptcy Act case:

> ". . . it seems almost self evident that Baseman with the consent and knowledge of the corporation was 'building up' the account so that it would be available at the proper time to meet the note. Cases where this is done form a well recognized exception to the rule of *New York County Nat. Bank v. Massey, supra.* See *Matters v. Manufacturers' Trust Company* (C. C. A.), 54 F.(2d) 1010, 1013. In such a case Judge Learned Hand points out, *'It was enough that the depositor alone intended not to use his right of withdrawal until the bank's right ended it. The deposit becomes a transfer because the depositor means it to be such;* that is, he means not to exercise his right of withdrawal as to all of it, but to leave some part until that right is gone. It is not necessary that the residue shall be determinable in advance; no more need ap-

> pear than that some part shall be left. When this is so the deposit is not in ordinary course; the part unused becomes a preferential payment when seized by set-off.' " *Frankford Trust Co. v. Comber*, 68 F.2d 471, 472 (3d Cir., 1933). [Emphasis supplied.]

The rule of law adopted in *Frankford Trust* has been adopted by every Court that has had occasion to consider it. See cases discussed in detail, Plaintiff's Brief, pp. 13-23.

The Bank merely begs the question in its recitation of general rules of law respecting the debtor-creditor relationships established in the normal bank deposit transaction. The question herein concerns whether this specific relationship between the Bank and Oakland, during the build-up period, was in fact a normal bank-depositor relationship, or whether in fact it was mere cloak for a preferential transfer.

As the cases discussed in detail in the prior briefs state, a bank deposit made in the ordinary course of business by a bankrupt will not constitute a preference but rather will create a debtor-creditor relationship between the Bank and the depositor respectively. But where a deposit by a bankrupt is made not in the ordinary course of business, but rather as preliminary to enabling the bank to effect a set-off, the transaction will not be treated as creating a debtor-creditor relationship, and instead will be held, following set-off, to be a transfer within the meaning of the Bankruptcy Act, presuming the other elements of a preference are present.

Under prior law, it was necessary for the Trustee in Bankruptcy to affirmatively prove, as an element of a preference, that the transfer in question was intended by the debtor as a prefer-

ence. The 1910 amendments to the Bankruptcy Act changed this rule, thus making less stringent the burden of a Trustee seeking to set aside preferences. No longer need it be proven as an independent element of his case that the debtor intended a preference. It was in response to this change in the law that the Courts made the statements quoted at pages 15-16 of Defendant's Brief to the effect that the intent of the transferor is not material in determining whether there has been a preference. Thus in *Alexander v. Redmond*, 180 F. 92 (2d Cir. 1910), quoted by the Bank, the District Court had concluded that although all the parties suspected a preference, a preference was not created because the debtor did not intend such a result. This Court reversed, stating:

> "We do not think the 'intent' of Borrn & Co. is material because the statute expressly provides that a transfer by an insolvent person within the four-month period shall be deemed to be a preference, if its effect will be to enable any creditor to obtain a greater percentage than others of his class. The result of the transfer and not the mental attitude of the transferor is made the test. The last part of Section 60 * * * provides that in order to set aside a preference by suit against the transferee it must be shown that he 'had reasonable cause to believe that it was intended thereby to give a preference.' But it is surely enough to show that he had reasonable cause to believe that there was such intent, without inquiring into the actual mental attitude of the person from whom he received the property transferred. If he has reasonable cause to believe that that person is insolvent and has reasonable cause to believe that the effect of the transfer will be to enable the transferee to obtain a greater percentage of his debt than any other creditor of

> the same class, the requirements of the concluding part of Section 60 are fully met." 180 F. at 95.

Accord, *In re Gaylord*, 225 F. 234, 238 (N.D.N.Y. 1915).

In *Cohen v. Goldman*, 250 F. 599, 601 (1st Cir., 1918), the same point respecting intent was made:

> "Previous to the amendment of June 25, 1910, it was necessary, to entitle the trustee to recover under this Section, that he should allege and prove, in addition to other facts, that the person receiving the transfer 'or to be benefited thereby, or his agent acting therein shall have had reasonable cause to believe that it was intended thereby to give a preference.' But since the amendment, the intent of the bankrupt in making the transfer is immaterial, and it is necessary to allege and prove that one who receives or is benefited by such transfer had reasonable cause to believe that it 'would effect a preference.' [citing cases]"

These and similar judicial statements respecting the pertinence of the intent of the debtor in determining whether there has been a preference are not applicable to the very different instant circumstance in which intent is at issue not as a distinct element of a preference, but rather is at issue as a component of whether there has been a transfer.

If a bank deposit is made in the ordinary course of business, a debtor-creditor relationship is created, and the intention of both the depositor and the bank is not material respecting whether, after a subsequent bankruptcy, there was a preference in the transaction. But where a deposit is made other than in the ordinary course of business, prior to bankruptcy, and a set-

off is subsequently made, the Trustee may set the set-off aside as a preference. *And it is the intention of the parties at the time the deposits are made that is determinative of whether the deposit was made in the ordinary course of business.* If made in the ordinary course of business, there is no transfer, since the relationship is one of debtor-creditor. But if made not in the ordinary course of business, then the deposits will be considered transfers within the meaning of the Bankruptcy Act.

Thus the cases cited by the Bank for the proposition that intent of the debtor is not material are inapplicable to the instant case. Here, *intent is pertinent not as a separate element of a preference* (as under the pre-1910 Act), *but rather as a crucial factor in determining whether there has been a transfer.* These old cases involved contentions by transferees that the Trustee had not sustained his burden of demonstrating the bankrupt's intent as an essential element of the transfer, situations where the creditor sought to establish that it did not receive a preference *because* the debtor did not intend a preference, or like contentions consistent with the effect of the 1910 amendment as stated above. Here, on the other hand, the concern is with whether the debtor intended a deposit to be made in the ordinary course of business, because if not made in the ordinary course of business, such deposits constitute transfers.

Did it constitute the ordinary course of Oakland's business to accumulate over $100,000.00 in its New York-non-interest-bearing checking account over a 2½ month period? Was it in the ordinary course of Glen Head's business to accept such substantial deposits in this type of account—an account opened as a condition to a loan, in which a "compensating" balance was maintained at its demand? Did either the Bank or the bank-

rupt intend a transfer when the deposits were made? This record presents sufficient evidence that these deposits were made other than in the ordinary course of business to require a jury trial on this factual issue. Summary Judgment was, therefore, improperly entered.

II

Plaintiff has stated the facts accurately.

Defendant's Brief is replete with conclusory statements respecting plaintiff's purported "distortions" of fact and "conclusory allegations." For the most part, defendant rests on such generalizations, without specifying in what way the record has been fictionalized." And in the few instances where specifics are given, they are falsely stated.

The first such statement concerns the question of prejudgment attachment by Oakland's creditors. This will be dealt with below and need not be further discussed. (See pp. 3-4-5 of defendant's Brief.)

The next such statement concerns whether the Glen Head account was used for Oakland's normal business transactions. (Defendant's Brief, p. 5). It is the use of the account during the year prior to bankruptcy and during the build-up period that is at issue. As reviewed in our initial Brief, the Exhibits (Exhibit C to Document 38, Kunin Affidavit, and Exhibit G to Document 33, defendant's own Famighetti Affidavit) show that from July of 1970, through March of 1971, a balance of between $1,300.00 and $5,800.00 was maintained in that account. Deposits were occasionally made, as were withdrawals,

but by and large the account was inactive. In July no checks were drawn on this account. In August three checks were drawn. The records of September of 1970 through April of 1971, a period of eight months, reflect that the only activity in the Glen Head account consisted of the following:

1. A check from the Glen Head account, payable to Glen Head on October 15, 1970;

2. A withdrawal of $300.00 on November 20, 1970;

3. A deposit of $3,000 on January 25, 1971, and a simultaneous withdrawal payable to First National Bank of Glen Head for interest of $2,656.25 on January 25, 1971;

4. A deposit of $2,922.79 on March 8,1971; and on April 13, 1971, a check in the amount of $2,656.25, payable to Glen Head for interest; and

5. On April 15, 1971, a check to Dun & Bradstreet in the amount of $792.40.

Then the build-up began; and during the 2½ month build-up period, no withdrawals were made.

During the period from July, 1970 to May, 1971, 891 checks were written by Oakland on the regular business account with St. Clair National Bank. The Bank asks the Court to close its eyes to reality when suggesting that the Glen Head account was used for ordinary business purposes.

Third, the Bank questions the probative value of the evidentiary basis for the Trustee's conclusion that Brede had been

in close contact with the Bank during the months prior to the set-off. Simply stated, the weight and strength of the evidence is not at issue on a Motion for Summary Judgment. In ruling on a Motion for Summary Judgment, the Court must construe all matters in favor of the opponent of the Motion, and all favorable inferences which can be drawn from his papers should be so drawn. *Adickes v. S. H. Kress Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). Further, facts asserted by the opponent of the Motion are regarded as true. *First National Bank of Cincinnati v. Pepper*, 454 F.2d 626 (2d Cir., 1972). And where the issue at bar is the credibility of a witness, the case must be tried. As stated by Wright and Miller, Federal Practice and Procedures, § 2727, pp. 530-531:

> "Inasmuch as the movant carries the burden of persuading the court that his statement of the facts is accurate, if his evidentiary material creates an issue of credibility, which is discussed in the preceding section, the case must go to trial unless it also appears that the party opposing the motion cannot prevail in any event and that the issue of credibility therefore is immaterial."

And as set out in Part IV, *infra*, the Affidavit of the Trustee's counsel, in such a situation, is sufficient to create a jury question as to credibility. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 88 L.Ed. 967, 64 S.Ct. 724 (1944).

At oral argument on the Motion for Summary Judgment, plaintiff's counsel advised the Court that Nancy Woodford had recently been located, living on the West Coast. It is anticipated that she would be available as a witness at trial, thus eliminating any hearsay problem in proving the fact of repeated contact

during the build-up period between Brede and Famighetti. No objection was made either during or subsequent to the deposition of Donald Katz to his statement respecting his conversation with Woodford (A. 16-17). Furthermore, plaintiff submits Famighetti's story is inherently not believable. Though admittedly aware that a substantial build-up was going on (A. 137), and aware of Oakland's financial straits (see plaintiff's Brief, pp. 4-5), the Court is asked to believe that there was no contact between these parties during this entire period.

Defendant Bank alleges "there is no evidentiary basis whatsoever for the Trustee's conclusory allegation that the set-off was not made until after the bank had forbade payment on checks in the [Glen Head] account." Defendant's Brief, p. 36. Examination of the deposition of Anthony Famighetti reveals, however, that the Trustee's statement is accurate. Famighetti testified that on July 29, 1971, he blocked the Glen Head account, to prevent any checks from being paid (A. 176). Document 43, Exhibit I is Famighetti's Memorandum of his conversation with Brede. He states therein that following the phone conversation, he placed a stop on the account and then, after placing the stop, consulted with others before agreeing to set-off the funds. The following day, the set-off was accomplished (A. 36).

The Bank further alleges that Oakland was engaged in business as usual before the set-off (Defendant's Brief, p. 37). The contrary is the truth, and there is no evidence whatsoever in the record to sustain the factual fabrication of the Bank. Indeed, by the time the Bankrupt began the buildup here challenged, it was virtually out of business. One months before the build-up began, in March, 1971, Oakland severely cut back its payroll; and the month it commenced the build-up, April,

1971, the factory had ceased to be a going concern and the office staff had been cut back. The next month, a second round of cutbacks was made in the office payroll, the factory having ceased operations the previous month. (Doc. No. 38, Exhibit C) (A. 11, 15).

The Bank's reference to the record in support of its contention, in fact reveals only that there was some minimal business activity going on at the time the set-off was made, and that Brede did not really know when the business totally ceased operations. (A. 191).

Plaintiff's Trustee's factual statement is accurate in all respects.

III

Under Illinois law, Oakland Foundry's property was not subject to pre-judgment attachment, and there were no judgment creditors of Oakland that could have attached its St. Clair account or other assets at the time of the buildup and set-off.

Contrary to First National's argument (at pp. 4-5 of its Brief) and the Trial Court's assumption (A. 40) that Brede deposited the funds in its Bank to avoid his creditors, examination of the statute pursuant to which defendant contends pre-judgment attachment was available, will reveal that no such remedy was available to a creditor of Oakland under Illinois law. Ill. Rev. Stat., Ch. 11, par. 1, respecting pre-judgment attachment, provides, in full:

> "1. Causes.] § 1. In any court having competent jurisdiction, a creditor having a money claim, whether liqui-

dated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting suit or thereafter, when the claim exceeds $20.00, in any one of the following cases:

First: Where the debtor is not a resident of this State.

Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

Sixth: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

Seventh: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

> Ninth: Where the debt sued for was fraudulently contracted on the party of the debtor. Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney. As amended by act approved August 24, 1965. L.1965, p. 3323."

None of these enumerated circumstances embraces the Bankrupt. And certainly Oakland's creditors would have had no reason to believe that a fraudulent concealment pursuant to any of the above circumstances was being attempted. The assertion of Brede that he was attempting to avoid his creditors by depositing these large sums of money in New York, an explanation adopted by the District Court, is without foundation in legal possibility. Pre-judgment attachment was not available under the applicable law, there were no judgment creditors in a position to attach funds (A. 33), and only one suit was pending against Oakland (for $1,600.00), which suit was filed 3½ months before the buildup began.

IV

Plaintiff's Exhibits and Affidavit were properly before the Trial Court.

Defendant has not preserved the question whether the Affidavit of Joel A. Kunin and the Exhibits appended thereto were properly before the Trial Court, and the alleged impropriety of these documents cannot be now urged as grounds for affirmance. The Memorandum of the Court does not dis-

close whether it considered or relied upon the Affidavit and Exhibits submitted by plaintiff. Plaintiff submits that said evidence was properly before the Court and that if the Court did not consider and rely upon that evidence in reaching its conclusion, that in itself is reversible error.

An Affidavit submitted pursuant to F.R.Civ. P. 56(e) is subject to a Motion to Strike where it is defective as to form or content. And failure to so move is a waiver. As is stated by Wright and Miller, Federal Practice and Procedure, § 2738, p. 706:

> "A party must move to strike an affidavit that violates Rule 56(e); if he fails to do so, he will waive his objection and, in the absence of 'a gross miscarriage of justice,' the court may consider the defective affidavit. This principle applies to affidavits containing evidence that would not be admissible at trial as well as to affidavits that are defective in form."

Here, no Motion to Strike was made, thus defendant waived its contention.

Furthermore, the Affidavit was proper both as to form and content. The matters contained therein are stated as being upon "personal knowledge" (A. 31). While some authorities state that an Affidavit of counsel is generally insufficient under the rule, that rule is not applicable where the attorney's Affidavit is, in fact, made upon personal knowledge. An attorney's Affidavit made upon personal knowledge is proper under Rule 56(e). Wright and Miller, Federal Practice and Procedure, §2738, p. 699; Moore's Federal Practice, ¶56.22[1], p. 56-1320-21. *Stephens v. Brown & Root, Inc.*, 338 F.Supp. 680,

affirmed 455 F.2d 1383 (5th Cir., 1972); *Douglas v. Beneficial Financial Co.*, 334 F. Supp.1166 (D.C. Alaska, 1971), reversed on other grounds 469 F.2d 453 (9th Cir., 1972). Here the Affidavit discloses that the affiant personally took control of all records on the premises of the bankrupt. By the time this matter came before the District Court on the defendant's Motion for Summary Judgment, Brede had disappeared, and the whereabouts of Nancy Woodford, the bankrupt's chief bookkeeper, was unknown. No one else was, therefore, readily available to establish a foundation for these documents.

Furthermore, defendant does not contest the validity of the Exhibits to the Affidavit of Joel A. Kunin. And in summary judgment proceedings, where the material facts are not disputed by the opposing party, an attorney's Affidavit is acceptable. *Lula v. Sivaco Wire & Mail Co.*, 265 F.Supp. 222, 224 (S.D.N.Y., 1967). Here the material facts set forth in the Affidavit and Exhibits thereto are not disputed, thus the Affidavit is sufficient.

At issue in this case is the credibility of Anthony Famighetti. In order to sustain a judgment in the Bank's favor, it is necessary that his professed ignorance respecting the impending set-off be believed notwithstanding his own statement that he had demanded that Oakland maintain a substantial compensating balance in the Glen Head account "to be sure that we weren't left out in the cold." (A. 89) The Supreme Court has held that where the issue is one of witness credibility, an attorney's sworn statement is sufficient to create a fact question for the jury requiring denial of a Motion for Summary Judgment. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 88 L.Ed. 967, 64 S.Ct. 724 (1944). This rule is applicable even where, as here, the testimony of the witness is uncontradicted, *The*

Conqueror, 166 U.S. 110, 41 L.Ed. 937, 17 S.Ct. 510, and especially where the witness, here the Bank's President, has an interest in the outcome of the case. *Sonnentheid v. Christian Moerkin Brewing Co.*, 172 U.S. 401, 43 L.Ed. 492, 19 S.Ct. 233. Also recognizing that placing the credibility of a witness at issue will preclude allowance of summary judgment, see *Eisbach v. Jo-Carroll Elect. Co-op, Inc.*, 440 F.2d 1171 (7th Cir., 1971).

As this Court stated, en banc, with reasoning applicable to the case at bar, in *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218, C.A.2d, 1968, certiorari denied 89 S.Ct. 1747, 395 U.S. 906, 23 L.Ed. 2d 219:

> "Indeed in many stockholder's derivative actions there will be issues as to the knowledge, intent and motive which will require a full trial with an opportunity to observe the demeanor of the witnesses, and to conduct cross-examination in open court. In such cases summary judgment cannot be granted even after discovery has been had."

Especially when the witness is an interested party, an issue of credibility requires that the finder of fact have the opportunity to examine the demeanor of the witness, and observe him under cross-examination. Summary Judgment is improper in such circumstances. *U.S. v. Perry*, 431 F.2d 1020 (9th Cir., 1970); *Block v. Biddle*, 36 F.R.D. 426 (D.C.Pa. 1965); *Hackley v. Roudenbush*, 520 F.2d 108, 159, n. 202, 171 U.S. App. D.C. 376 (D.C. 1975). Accord, see the Committee Note to the 1963 Amendment to Subdivision (e), wherein is clearly stated:

> "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order

to evaluate their credibility, summary judgment is not appropriate." Moore's Federal Practice, ¶ 56.01[14].

Here defendant is contending only that a proper foundation has not been established for the documents in question, but has not suggested that the documents are not valid. In this situation, where the original custodian of the records could not be reached when the Motion was prepared and argued, the warning of Wright and Miller is particularly applicable:

> "Moreover, overly strict adherence to the demands of Rule 56(e) could lead to an undue amount of energy being devoted to 'qualifying' affidavits or to the precipitous granting of summary judgment when opposing affidavits are found to be unacceptable under the rule." Wright and Miller, *supra*, § 2738, p. 695.

As the Court in the District of Columbia has recognized:

> "We think the rule does not require an unequivocal ruling that the evidence suggested in this particular affidavit would be admissible at the trial as a condition precedent to holding the affidavit raises a genuine issue. In many cases, it is possible to say without qualification that evidence recited in an affidavit under Rule 56(e) would or would not be admissible; but it is not so here. Admissibility of testimony sometimes depends upon the form in which it is offered, the background which is laid for it, and perhaps on other factors as well.
>
> "It is therefore possible, and perhaps probable, that Lockhart's alleged admissions out of court will be admissible. In the particular circumstances here involved, this is sufficient to defeat the motion for summary judgment, be-

> cause courts are inclined to hold the movant to a strict demonstration that no genuine issue exists." *Corley v. Life and Casualty Insurance Co. of Tennessee*, 296 F.2d 449, 450, 111 U.S. App. D.C. 327 (D.C., 1961).

And although the records are hearsay, hearsay may be considered by the Court in ruling on a Motion for Summary Judgment. *Corley v. Life and Casualty, supra; Douglas v. Beneficial Finance Co., supra.* Particularly where, as here the sole objection is to foundation, and where no dispute exists as to validity, it would thwart the purposes of summary judgment to disallow consideration of these documents at this stage of the proceedings.

The rule has been often stated that a "double standard" is used in evaluating supporting and opposing papers in Motions for Summary Judgment, imposing a strict standard on the movant and a lax standard on the opponent. *Bender v. New Zealand Bank & Trust, Ltd.*, 67 F.R.D. 638 (D.C.N.Y., 1974); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir., 1962); *Washington v. Cameron*, 411 F.2d 705, 133 U.S. App. D.C. 391 (D.C., 1969); *Wittlin v. Giacalone*, 154 F.2d 20, 81 U.S. App. D.C. 20 (D.C., 1946).

In *Shinabarger v. United Aircraft Corp.*, 262 F.Supp. 52, 56, n. 3, affirmed in part, reversed on other grounds, 281 F.2d 808 (2d Cir., 1967), the Court refused to grant summary judgment because the unsworn affidavit submitted in opposition to the motion "although not presently in evidentiary form, should alert the summary judgment court to the availability at the trial of the facts contained in the statement [*Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir., 1940)]; accordingly, the existence of such a statement precludes the summary judgment court

from drawing an inference adverse to paintiff as the party opposing the motion with respect to the facts contained in the statement." This rule should be applied in the case at bar.

As the Court stated in *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir., 1940), discussing summary judgment procedure under Rule 56:

> "Summary judgment is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer in a trial * * *
>
> "It is quite clear that technical rulings have no place in this procedure and particularly that exclusionary rules will not be applied to strike, on grounds of formal defects in the proffer, evidence proferred on tendered issues * * * For the offer of the transcript certainly apprised the judge that there was relevant and important evidence which defendant-appellant could and would tender on the trial. * * *"

V

Whether Brede benefited by the set-off is irrelevant in determining whether the bank obtained a preference.

There is no dispute but that Herman Brede was benefited by the build-up and set-off herein. Had Oakland's obligation to the Bank not been paid, Brede would have lost all his stock

in his several corporations and pursuant to the second mortgage of June 18, 1970, his home as well. But the fact that Brede received a benefit from this transaction does not mean that the Bank did not receive a preference. If the Bank received a preference as defined in Section 60 of the Bankruptcy Act, that transfer is voidable by the Trustees, no matter what its consequences were to Brede.

VI

The trustee established a prima facie case.

The question whether Oakland was insolvent was not argued or at issue before the District Court. The Court's interpretation of the facts before it caused it correctly to assume insolvency. And, indeed, in the plaintiff's answers to interrogatories, it appears that:

> "8. At the time of the setoff on June 30, 1971, by the First National Bank of Glen Head, Oakland Foundry Company of Belleville, Illinois, Inc., had debts, not including that of the First National Bank of Glen Head in the gross amount of approximately $585,000.00. Oakland Foundry Company had inventory, fixtures and equipment with a fair market value of approximately $100,000.00; had accounts receivable of approximately $50,000.00 and had building with real estate with a value of $175,000.00. It further had approximately $1,500.00 cash on hand."

These debts, including the Glen Head debt, were $710,000.00, and assets were $326,500.00. Further before the Court were profit and loss and balance sheets, provided by the bank-

rupt which it is not clear that all of the bankrupt's debts a (Exhibits to Defendant's answers to interrogatories and response to request for production of documents, Document No. 16). The basis for and validity of these figures was subject to proof at trial, of course, but for purposes of the Motion at hand, this was sufficient proof of insolvency to get the plaintiff beyond a Motion for Summary Judgment. The question was for the jury. *Kaufman v. Tredway*, 195 U.S. 271, 25 S.Ct. 33, 49 L.Ed.2d 190 (1904). With respect to proof of insolvency, see Colliers ¶ 1.19[5], pp. 130.6-130.14, ¶ 60.31, pp. 894-897.

In quoting Colliers on p. 24 of its Brief, defendant Bank has omitted the remainder of the treatise's statement:

> "Apprehension or suspicion on the part of the creditor is not sufficient to constitute the 'reasonable cause to believe' which is required by § 606 of the Act. * * * But if the suspicion is founded upon facts which would invite an intelligent business man to an inquiry which would have disclosed that the debtor is insolvent, it is equivalent to a reasonable cause to believe within the meaning of the Act." Colliers on Bankruptcy, ¶ 60.53, p. 1066.1-1069.

See *Margolis v. Gem Factors Corp.*, 201 F.2d 803 (2d Cir., 1953).

This record abounds with such facts as would prompt an intelligent businessman to make inquiry into Oakland's status. The Bank had long been aware of Oakland's financial difficulties. Oakland had regularly provided the Bank with financial statements reflecting its adverse circumstances. The Bank had

recognized Oakland's inability to timely pay the time note, and had accordingly converted the $125,000 Note to a Demand Note. The Bank was sufficiently concerned with Oakland's financial standing to demand a second mortgage on Brede's home as supplemental security in addition to the stock already pledged and the personal guarantee already made. The Bank's credit memo of June 18, 1970 (Exhibit "O" to Doc. No. 16) reflects that even at that early date, the Bank had advised Oakland that they "want[ed] out." The Bank knew that Oakland operated on a continuing loss basis. and knew that Oakland had a cash flow problem and had a low level of working capital. Indeed, the profit and loss statements which the bank possessed (Exhibits to Doc. 16) showed deficit operations by Oakland year after year. The Bank knew Oakland's debts, including those to the Small Business Administration were too heavy for it to carry, and knew that Oakland had obtained all the loans it could from the St. Clair National Bank in Belleville. The Bank knew how little money Oakland kept in its Glen Head account. The Bank also was aware that Oakland had falsified its 1970 Dun & Bradstreet Report. (A. 108, 109, 150, 115, 116, 128, 129, 122, 126, 130, 132, 133, 138, 139, 164, 165).

In *Boston National Bank v. Early*, 17 F.2d 691 (1st Cir., 1927), the Bank had renewed its notes, knew of the depositor's low balance in its account, and had taken a transfer of merchandise as additional security on its loan. The Court held these facts to be sufficient to give the Bank cause to believe the debtor to be insolvent.

An excellent example setting forth the kind of facts which should alert a Bank to investigate the possibility that its debtor is insolvent is this Court's recent decision in *Miller v. Wells*

Fargo Bank International Corp., 540 F.2d 548 (2d Cir., 1976). See the many cases collected at Colliers, ¶ 60.53, pp. 1057, n. 1, pp. 1059-1060 n., respecting sufficiency of proof of the creditor's reasonable cause to believe the debtor to be insolvent.

Many of the facts which constituted the reasonable grounds for belief that Oakland was insolvent appear in the Bank's own records. And the Bank had knowledge of those matters in its books. *Cohen v. Tremont Trust Co.*, 256 F. 399, aff'd. 263 F. 81 (D.C. Mass.).

The factual inferences to be drawn respecting the Bank's knowledge are preeminently matters for the jury. *Roche v. New Hampshire National Bank*, 192 F.2d 203 (1st Cir., 1951); *Kaufman v. Tredway*, 195 U.S. 271, 25 S.Ct. 33, 49 L.Ed. 190 (1904). Thus, the Trustee established its prima facie case as to these elements of its cause of action.

CONCLUSION

Wherefore, plaintiff-appellant, the Trustee in Bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc., prays that this Court will reverse the decision of the District Court, and will remand this cause for trial by jury of all the factual questions.

Respectfully submitted

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Willie Brown , of lawful age, being duly sworn, upon his oath states that he did, on the 6th day of April , 19 77 , place in the United States Post Office at St. Louis, Missouri, an envelope containing two printed copies of Reply Brief of Appellant in the following entitled cause

4-7

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-7577

DONALD KATZ, Trustee in Bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc.,
Plaintiff-Appellant,

vs.

FIRST NATIONAL BANK OF GLENHEAD,
Defendant-Appellee.

that the prope as plainly address

Messrs. Weil, Gotshal & Manges
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Affiant.

Subscribed and sworn to before me this 6th day of April , 19 77
I am duly authorized under the laws of the State of Missouri to administer oaths.
My Commission Expires Oct. 1, 1977

Notary Public within and for the City of St. Louis, Missouri.

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